Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BMC INDUSTRIES, INC.,

Petitioner,

v.

BARTH INDUSTRIES, INC., Nesco, Inc., f/k/a Nesco Management, Inc., Barth Industries Co. Limited Partnership, BIC Corporation, Nesco Holdings, Inc., f/k/a Nesco, Inc.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In rendering a decision directly in conflict with the seminal decision of the Seventh Circuit on a key provision of uniform commercial law, should the Eleventh Circuit have certified the dispositive issue involving that key provision to the Florida Supreme Court rather than imposing its own unprecedented view on Florida?

LIST OF PARTIES AND CORPORATE AFFILIATIONS

There are no additional parties in this proceeding.

Petitioner has no parent company and its only nonwholly owned subsidiary is P.T. Vision-Ease Asia. Barth Industries, Inc. is a wholly owned subsidiary of Nesco Holdings, Inc. and trial resulted in a split verdict against Barth and Nesco. However, the reversed judgment on the verdict entered against Nesco on the theory of promissory estoppel is not in issue. Only the contract liability against Barth under Article 2 is presented for review.

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BMC Industries, Inc. petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 160 F.3d 1322 (1998). The opinion of the trial court determining that the Uniform Commercial Code does not apply to the transaction (App. B) is unreported.

STATEMENT OF JURISDICTION

The Eleventh Circuit entered its decision on November 18, 1998, at which time the judgment of that court was entered. (App. A). Petitioner timely served its petition for rehearing and suggestion for rehearing *en banc* and for certification on December 9, 1998, which the court denied on December 30, 1998. (App. E). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1), which permits review of decisions that conflict with decisions of the circuit courts on the same matter, and § 2101(c). *See* Rules of the Supreme Court 10(a) and (c).

STATUTES, CONSTITUTIONAL PROVISION AND RULE INVOLVED

1. Since this case primarily involves a section of a uniform act adopted by Florida, both the uniform act provision and the wording of the provision adopted by Florida are set forth below. Excepting the italicized words and numbers, the two sections are identical.

(a) U.C.C. 2-209. Modification, Rescission and Waiver.

(1) An agreement modifying a contract within this *Article* needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this *Article (Section 2-201)* must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

(b) *Florida Statutes* § 672.209. Modification, Rescission and Waiver

(1) An agreement modifying a contract within this *chapter* needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this *chapter (s. 672.201)* must be satisfied if the contract as modified is within its provision.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

2. This case also involves the jurisdiction of the Florida Supreme Court to accept certified questions from the Supreme Court of the United States or a United States Court of Appeals. The relevant provisions of Florida law appear below.

(a) *Fla. Const.* art. V § 3(b)(6)

* * *

(b) JURISDICTION. — The supreme court.

* * *

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

* * *

(b) *Florida Statutes* § 25.031. Supreme Court authorized to receive and answer certificates as to state law from federal appellate courts.

The Supreme Court of this state may, by rule of court, provide that, when it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the Court of Appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law, which certificate the Supreme Court of this state, by written opinion, may answer.

(c) *Florida Statutes* § 25.032 Certification of questions of law; rules and regulations.

> The Supreme Court of this state is hereby authorized and empowered to collaborate with any and all other courts of last resort, of other states and of the United States, in the preparation and approval of uniform rules of court to make effective this and similar laws.

6. *Fla. R. App. P.* 9.150 Discretionary Proceedings To Review Certified Questions From Federal Courts.

> (a) Applicability. On either its own motion or that of a party, the Supreme Court of the United States or a United States court of appeals may certify a question of law to the Supreme Court of Florida if the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida.
>
> (b) Certificate. The certificate shall contain the style of the case, a statement of the facts showing the nature of the cause and the circumstances out of which the questions of law arise, and the questions of law to be answered. The certificate shall be prepared as directed by the federal court. It shall be certified to the Supreme Court of Florida by the clerk of the federal court.
>
> (c) Record. The Supreme Court of Florida, in its discretion, may require copies of all or any portion of the record before the federal court to be filed if the record may be necessary to the determination of the cause.

(d) Briefs. The brief of the party designated by the federal court as the moving party shall be served within 20 days of the filing of the certificate. Additional briefs shall be served as prescribed by rule 9.210.

(e) Costs. The costs of these proceedings shall be divided equally between the parties unless otherwise ordered by the court.

STATEMENT OF THE CASE

This case involves intercircuit conflict over an interpretation of a provision of Article 2 of the Uniform Commercial Code, as adopted by Florida.[1] Certiorari is sought because the Eleventh Circuit (per Judge Gerald Tjoflat) has rendered a decision in conflict with the Seventh Circuit (per Chief Judge Richard Posner). The consequences of the conflict are particularly significant in view of Florida's central role in the global commercial market. Despite certification procedures in place to address such matters, the Eleventh Circuit has nevertheless managed to tear asunder a key provision of uniform law and in the process of refusing to certify the issue, it has imposed a never before recognized minority view on Florida. The purpose of the Uniform Commercial Code is stated in § 1-102(2) which makes it clear that its adoption was intended:

---

1. Petitioner is a Minnesota based publicly traded corporation which entered into a contract with respondents, Ohio based designers and manufacturers of heavy commercial machinery. The contract was to be performed in Florida for world-wide distribution of plastic eyeglass lenses.

* * *

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

* * *

This purpose becomes increasingly important in the shrinking universe of global commercial transactions. Like the other forty eight states adopting the UCC, Florida has determined that it wants to be a part of the uniform process. *Florida Statutes* § 671.102(2). Florida has also determined by its certification procedures that it wants to be consulted when an unresolved matter of Florida law comes before the Eleventh Circuit, and the court should have taken advantage of that opportunity rather than creating unnecessary confusion impacting interstate and international business transactions.

The essential facts are not in dispute. In October 1986, petitioner signed a contract with respondent Barth, a wholly owned subsidiary of respondent Nesco, to design, manufacture and install a system to automate production of the plastic lenses. After multiple completion date extensions had come and gone, petitioner stayed with the project because of its reliance on the respondents' assurances that the project would be completed eventually. However, despite fourteen promised completion dates which had come and gone, despite

repeated warnings issued to respondents by petitioner to deliver a workable system (spanning a period of more than twenty months beyond the final contract delivery deadline), despite petitioner's reliance upon respondents' assurances that the project would be completed, no workable system was ever delivered to petitioner. In early June of 1989, petitioner sued.

Prior to trial, the parties moved for summary judgment on the application of the UCC. Petitioner asserted that it did not apply and the trial court agreed (App. B). When the UCC issue arose again at trial, however, petitioner contended — and still contends — that the common law and the UCC are the same as to the dispositive "waiver" issue. Both the UCC and the common law require "detrimental reliance." Judge Posner's Seventh Circuit opinion in *Wisconsin Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986), which forms the basis of the intercircuit conflict, supports petitioner's position.

In any event, the jury was presented with all the evidence and returned verdicts against respondent Barth and respondent Nesco respectively for breach of contract and promissory estoppel in the amounts of $3 million and $2.1 million. The Eleventh Circuit reversed for a new trial as to respondent Barth only and for the entry of judgment in favor of respondent Nesco. It concluded that under § 2-209 of the UCC, "waiver" of a performance deadline by a buyer does not require "detrimental reliance" by a seller; that petitioner, as the buyer, waived the performance deadline *as a matter of law*; that the performance deadline was therefore extended for a "reasonable time"; and that a *new* jury should therefore decide whether the extended time for performance was reasonable or not.

BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction in the court of first instance is 28 U.S.C. § 1332 in that it is a civil action where the matter in controversy exceeds the minimum jurisdictional threshold, exclusive of interests and costs, and is between citizens of different states.

REASONS FOR GRANTING THE WRIT

Introductory Statement

This case presents interrelated questions necessary to protect the integrity of the process by which states adopt and interpret uniform laws in an atmosphere of "cooperative judicial federalism." *Lehman Bros v. Schein*, 416 U.S. 386, 391 (1974). The conflict between the Eleventh Circuit (per Judge Tjoflat) and the Seventh Circuit (per Chief Judge Posner) involves a point of law adversely impacting business transactions in Florida — a center of global commerce. In creating the conflict, the Eleventh Circuit failed to permit Florida to determine a significant issue under its own statutory laws despite certification procedures in place giving it the right to address novel or unsettled issues. *Id.* Because the Florida Supreme Court is one of limited jurisdiction, it is unlikely that the "waiver" issue will ever come before that court. The Eleventh Circuit has therefore usurped Florida's role in determining its own law despite procedures which provide a vehicle for avoiding the very problem that has now been created. Controlling precedent is established which not only binds all federal district courts sitting in the Eleventh Circuit, but will undoubtedly influence the trial and intermediate appellate courts of Florida as well.

I. THE INTERCIRCUIT CONFLICT.

Florida is a world center of commercial trade and the Uniform Commercial Code is an important component of such trade. When litigation arises under Article 2, the interstate and international nature of such controversies normally means that litigation will be filed in federal court, and all federal courts sitting in Florida applying state law will necessarily be bound by the Eleventh Circuit's decision under Article 2 as if it were a decision of the Florida Supreme Court. The Eleventh Circuit's opinion has gone way beyond deciding a single case — it has effectively become a *de facto* opinion of the Florida Supreme Court, which is in conflict with the seminal decision authored by Chief Judge Posner.

The Eleventh Circuit's decision turned on its interpretation of "waiver" under 2-209(4) of the Uniform Commercial Code, adopted in Florida as *Florida Statutes* § 672.209(4). In analyzing the issue, the court *acknowledged* that it was creating express and direct conflict with Chief Judge Posner's decision in *Wisconsin Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986), the watershed case on waiver under Article 2. That case holds that to be effective a waiver must be supported by detrimental reliance.

In *Wisconsin Knife Works*, the buyer had contracted for the purchase of spade bit blanks to use in its manufacturing process. The parties had agreed that no modification of the contract would be binding unless made in writing and signed by the buyer's representative. When the seller later failed to meet the contractual deadline, the buyer sued for breach of contract. The seller claimed that based on the buyer's conduct, the buyer had waived the deadline. The district court agreed with the seller and entered judgment in its favor.

On appeal, the Seventh Circuit reversed. In so ruling, the court analyzed the question of whether the seller could nullify the contract term requiring that modifications be in writing simply by relabelling the buyer's conduct as a "waiver" under § 2-209(4), rather than calling it a "modification" under § 2-208(2). Writing for the court, Chief Judge Posner explained that the buyer's conduct could not be deemed a waiver without detrimental reliance on the part of the seller.

> If § 2-209(4), which as we said provides that an attempted modification which does not comply with subsection (2) can nevertheless operate as a "waiver," is interpreted so broadly that any oral modification is effective as a waiver notwithstanding § 2-209(2), both provisions become superfluous. . . . The path of reconciliation with subsection (4) is found by attending to the precise wording of (4). It does not say that an attempted modification "is" a waiver; it says that "it can operate as a waiver." It does not say in what circumstances it can operate as a waiver; but if an attempted modification is effective as a waiver only if there is reliance, then both §§ 2-209(2) and 2-209(4) can be given effect.

Id. at 1286-87 (emphasis added). The court went on to say:

> Reliance, if reasonably induced and reasonable in extent, is a common substitute for consideration in making a promise legally enforceable, in part because it adds something in the way of credibility to the mere say-so of one party. . . . We find support for our proposed reconciliation of

> subsections (2) and (4) in the secondary literature. . . .

Id. (citations omitted). In reaching the conclusion that the two provisions are not superfluous and that a "waiver" is effective only where there is reliance by the non-waiving party, the Seventh Circuit appropriately construed "modification" and "waiver" in such a way as to give independent meaning to both subsections (2) and (4). As Chief Judge Posner stated in *Wisconsin Knife Works*, the draftsmen of § 2-209 "did not just want to give 'modification' another name — 'waiver'." 781 F.2d at 1288. To the contrary, the drafters *intended* independent meaning, yet the Eleventh Circuit's decision disrupts that intent and binds a significant portion of interstate and international commercial transactions in a major trade center to a minority view.

In *Flowers Ginning Corp. v. Arma, Inc.*, 106 F.3d 390 (4th Cir. 1997), the Fourth Circuit was called upon to interpret the issue of "waiver" under Georgia law and followed *Wisconsin Knife Works*. Thus, even Georgia law interpreted by a neighboring circuit is at variance with the Eleventh Circuit's view of the same provision. The "uniform law" is consequently not even uniform within the Eleventh Circuit, much less within the United States. *See also*, White & Summers, *Uniform Commercial Code*, § 1-6, at 33-34 (West 1995).

The intercircuit conflict alone serves as a basis for jurisdiction in this court. What truly makes the issue compelling, however, is the Eleventh Circuit's failure to recognize that Florida has procedures in place to afford it the opportunity to deal with its own novel or unresolved issues.

Lehman Brothers v. Schein, 416 U.S. 386 (1974). As explained below, *Lehman* strongly suggests that the Eleventh Circuit should have taken advantage of those procedures, rather than assuming that Florida would adopt an unprecedented minority view.

II. THE REFUSAL TO CERTIFY.

In *Lehman*, a decision of the Second Circuit was reversed based on that Court's refusal to certify a controlling issue of state law to the Florida Supreme Court. In *Lehman*, the Court gave a strong endorsement to certification where the process will likely tip the scale in favor of having a state court first address an important, yet unclear question. The Second Circuit found that Florida law was controlling but none was decisive. It then looked to precedent from other jurisdictions and concluded that Florida would more likely than not follow that precedent. Given the "novelty of the question and the great unsettlement of Florida law", this Court determined that the Second Circuit should have taken advantage of Florida's certification procedures. *Id.* at 391. In this case, certification is even more compelling than in *Lehman*. First, this matter involves an interpretation of uniform law as applied to a jurisdiction in the forefront of global commerce. And second, the court rejected all existing precedent in favor of its own maverick view. Consistent with this Court's reasoning in *Lehman*, the Florida certification procedure should have been utilized by the Eleventh Circuit in this case.

While petitions for certiorari are not normally granted to review what purports to be *solely* an interpretation of state law, *Leavitt v. Jane L.*, 518 U.S. 137 (1996) expresses this Court's willingness to listen where the alternative is to turn a "blind eye" to state law determinations that are far reaching in their impact, controversial, or perhaps even "plainly wrong." *Id.* at 144-45. *Compare California State Board of*

Equalization v. Chemehuevi Indian Tribe, 474 U.S. 91 (1986). Consistent with Justice Stevens' dissent in *Chemehuevi*, petitioner is not asking the Court to decide the waiver issue, but rather to remand this case so that Florida certification procedures can be followed.[2]

The threshold question, then, is whether the rationale expressed in *Lehman* and *Leavitt* applies to this case. That question is readily answered in the affirmative because of the nature of the problem, both legally and factually. Regarding the significance of the legal issue, Judge Posner in *Wisconsin Knife Works* resolved the tension between the requirement that modifications in commercial transactions must be in writing under § 2-209(2) and the view that everything else is a "waiver" under § 2-209(4). He reasoned that an attempted "unwritten" modification is a waiver only if there is detrimental reliance. Written modification would otherwise be an illusory requirement and *Wisconsin Knife Works* so holds. 781 F.2d 1280 (7th Cir. 1986). Surprisingly, Judge Tjoflat rejected *Wisconsin Knife Works* in favor of his own aberrational theory. Given the proliferation of multi-circuit, interstate and international commercial transactions in Florida, the state law determination by the Eleventh Circuit is indeed "far reaching", it is certainly "controversial", and perhaps even "plainly wrong". *Leavitt*, 518 U.S. at 144-45. But the important point here is that it should be left up to Florida to decide for itself. The Eleventh Circuit had an opportunity to ask the Florida Supreme Court for a definitive answer on this point, *Florida Statutes* § 25.031 and *Fla. R. App. P.* 9.150, and should have taken advantage of it, rather

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2. The Court noted in *Lehman* the Fifth Circuit's willingness to certify "is in part a product of frequent state repudiation of its interpretation of state law." 416 U.S. at 390 n.6.

than creating an unnecessary level of confusion. *See Diffenderfer v. Central Baptist Church of Miami Florida, Inc.*, 404 U.S. 412, 416 (1972) (Douglas, J., dissenting).

Beyond considerations of uncertainty and lack of uniformity brought about by the Eleventh Circuit's failure to certify the question, there is an issue of practicality. The transaction originated in 1987. The case was tried over several weeks in early 1995 and a verdict was rendered based on stipulated instructions. The case was pending in the Eleventh Circuit for nearly three years. While a new trial may well be inevitable, the Eleventh Circuit should have recognized all that is at stake in a remand of a complex matter where an unsettled issue of state law is the determining factor.

Wisconsin Knife Works should have been a "red flag" because it underscores an uncertainty that the Eleventh Circuit could have avoided by seeking the benefit of the law's authoritative construction from the Florida Supreme Court. *Cf., Virginia v. American Book Sellers Assoc., Inc.*, 484 U.S. 383, 396 (1988). The only requirement for certification under Florida law is that the issue must be determinative of the cause. The "waiver" issue is just that. *Compare State of Florida ex rel. Shevin v. Exxon*, 526 F.2d 266 (5th Cir. 1976). This court noted in *Bellotti v. Baird*, 428 U.S. 132, 150-51 (1976), quoting from *Lehman*, 416 U.S. at 391, that state certification procedures "save time, energy, and resources." It is important that the Eleventh Circuit acknowledge and apply those principles in order to build the "cooperative judicial federalism" envisioned by *Lehman* and *Bellotti*.

CONCLUSION

The Eleventh Circuit has rendered a decision directly in conflict with the seminal decision of the Seventh Circuit on a key provision of uniform commercial law. The Eleventh Circuit should have certified the issue to the Florida Supreme Court rather than imposing its own unprecedented view on Florida. The decision should be vacated and the case should be remanded in order for the court to reconsider the issue of certification.

Respectfully submitted,

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